92-277

Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

No. ____-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PoPEOPLE, INC., Petitioner

v.

LABOR AND INDUSTRIAL
RELATIONS COMMISSION,

and

DIVISION OF EMPLOYMENT SECURITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

NEWHOUSE, BYERS & SWANEY, P.C.

By: James O. Swaney, Jr. (#23706)
304 West Walnut, Suite 210
Independence, MO 64050-3883
Telephone (816) 833-3000
Telefacsimile (816) 833-3733
ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I. Does construction of § 288.110, RSMo, so as to require an all-or-nothing approach to successorship regarding unemployment tax contribution rates, regardless of the actual effect of those rates on employment security, violate the Due Process clause of the Fourteenth Amendment of the United States Constitution because it bears no rational relationship to a legitimate state interest?

II. Does construction of § 288.110, RSMo, so as to require an all-or-nothing approach to successorship, regardless of the actual effect on employment security, and so as thus to impose unfavorable contribution rates upon a successor employer who declines to pay a predecessor's delinquency from which a Bankruptcy Court had relieved that successor employer of any responsibility, conflict with the purposes of the Bankruptcy Code and violate 11 U.S.C. § 525 and thereby make that State statute invalid under the Supremacy Clause, Clause 2 in Article VI and under Clause 4 in Section 8 of Article I of the United States Constitution?

III. Is it a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution to require an employer, without notice, to carry the burden of proving that its retaining of a favorable unemployment tax contribution rate would enhance the employment security of its workers?

TABLE OF CONTENTS

QUESTIONSPRESENTED.....i

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....2

JURISDICTION.....3

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.....5

STATEMENT OF THE CASE.....11

REASONS FOR GRANTING THE WRIT

1. The Missouri Supreme Court's holding that successorship under § 288.110, RSMo, requires an all-or-nothing approach regardless of the effect on employment security violates Petitioner's rights to Due Process under Fourteenth Amendment, because the requirement bears no rational relationship to a legitimate state interest.....19

2. The Missouri Supreme Court's holding that successorship under § 288.110, RSMo, regarding unemployment tax contribution rates, requires an all-or-nothing approach regardless of the effect on employment security, so as thus to impose unfavorable rates upon a successor employer who declines to pay a predecessor's

delinquency from which a Bankruptcy Court had relieved that successor employer of any responsibility, conflicts with the purpose of the Bankruptcy Code and violates 11 U.S.C. § 525, making it invalid under the Supremacy Clause, Clause 2 in Article VI and under Clause 4 in Section 8 of Article I of the United States Constitution.....22

3. The Appeals Tribunal of the Division of Employment Security, the Labor and Industrial Relations Commission, the Trial Court, and the Missouri Supreme Court, erred in holding that Petitioner, without notice of any such burden, must show that retaining the favorable contribution rates would enhance the employment security of Petitioner's employees, rather than that it would merely maintain their employment security.....33

CONCLUSION.....36

APPENDICES

Opinion of the Missouri Supreme Court....A

Decision of the Appeals Tribunal of the Division of Employment Security.....B

Order of the Labor and Industrial Relations Commission.....C

Judgment of the Trial Court.....D

Motion for Rehearing Overruled.....E

TABLE OF AUTHORITIES

Acton Corporation v. Labor and Industrial Relations Commission, 602 S.W.2d 53 (Mo.App. 1980).....20, 21

In re The Bible Speaks, 69 B.R. 368, (Bank.D.Mass.1987).....31

Blue Cross Hospital Service, Inc., v. Frappier, 681 S.W.2d 925 (Mo.banc1985).....20

Fix v. Automobile Club Inter-Insurance Exchange, 413 S.W.2d 194 (Mo. 1967).....27

Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962).....27

Parker v. Contractors State License Board, 187 Cal.App.3d 207, 231 Cal.Rptr. 577 (1986).....32

Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).....25

In re Rees, 61 B.R. 114 (Bank. D.Utah 1986).....32

State ex rel. Cook v. Saynes,
713 S.W.2d 258 (Mo.banc 1986).....34

United States v. Carolene Products Co.,
304 U.S. 144, 152, 58 S.Ct. 778,
82 L.Ed.2d 1234 (1938).....20

Western & Atlantic Railroad v. Henderson,
279 U.S. 639, 642, 49 S.Ct. 445, 447,
73 L.Ed.2d 884 (1929).....34

In re Wolverine Radio Co., 930 F.2d 1132
(6th Cir. 1991).....26, 27

IN THE SUPREME COURT OF THE UNITED STATES

October, 1992

PoPEOPLE, INC., Petitioner

v.

LABOR AND INDUSTRIAL
RELATIONS COMMISSION,

and

DIVISION OF EMPLOYMENT SECURITY,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI**

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, PoPeople, Inc., respectfully prays that the Supreme Court

of the United States issue its writ of certiorari to review the judgment and opinion of the Supreme Court of Missouri, entered under the style of PoPeople, Inc. v. Labor and Industrial Relations Commission and Division of Employment Security, on April 21, 1992, as to which Petitioner's motion for rehearing was denied on June 2, 1992.

OPINIONS BELOW

The opinion of the Missouri Supreme Court as modified on its own motion, Slip Opinion #74070, is reproduced as Appendix A, infra.

The orders and judgments of the Appeals Tribunal of the Division of Employment Security, the Labor and Industrial Relations Commission, and the Trial Court have not been published. They are reproduced in the appendices B, C and D, infra.

JURISDICTION

Petitioner appealed, first to the Respondent Labor and Industrial Relations Commission, then to the Circuit Court of Cole County, Missouri, and then to the Supreme Court of Missouri, the determination of the Appeals Tribunal of the Respondent Division of Employment Security (DES) that Petitioner was not entitled to the favorable contribution rates for unemployment taxes which Petitioner had theretofore enjoyed as successor in an ongoing business. Petitioner preserved throughout the proceedings its claims that denying it the benefit of those favorable contribution rates, and construing § 288.110, RSMo, so as to require denying it that benefit, violated its rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, under the

Supremacy Clause, Clause 2 in Article VI of the United States Constitution, under that part of Article I, Section 8, Clause 4 of the United States Constitution providing for uniform laws on the subject of bankruptcies throughout the United States, and under 11 U.S.C. § 525. This case comes under the exclusive appellate jurisdiction of this Court because it involves the validity, under the United States Constitution and under federal law, of § 288.110, RSMo, as construed thus far in this litigation to deny Petitioner the benefit of those favorable contribution rates which Petitioner previously enjoyed with the approval of Respondent DES as successor in an ongoing business.

Petitioner invokes the jurisdiction of this Court to review the judgment of the Supreme Court of Missouri under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article VI, Clause 2, Constitution of the United States of America:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

Article I, Section 8, Clause 4, Constitution of the United States of America: The Congress shall have the Power * *

To establish an uniform Rule of

Naturalization and uniform Laws on the subject of Bankruptcies throughout the United States.

Amendment 14, Section 1, Constitution of the United States of America: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11 U.S.C. § 525: * * * a governmental unit may not deny revoke, suspend or

refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against * * * * or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

Section 288.110 RSMo.: Any individual, type of organization or employing unit which has acquired substantially all of the business of an employer, excepting in any such case any assets retained by such employer incident to the liquidation of his obligations, and in respect to which the division finds that immediately after such change such business if the predecessor employer is continued without interruption solely by the successor, shall stand in the position of such predecessor employer in all respects, including the predecessor's separate account, actual contribution and benefit experience, annual payrolls, and liability for current or delinquent contributions, interest and penalties. If two or more individuals, organizations, or employing units acquired at approximately the same time substantially all of the business of

an employer (excepting in any such case any assets retained by such employer incident to the liquidation of his obligations) and in respect to which the division finds that immediately after such change all portions of such business of the predecessor are continued without interruption solely by such successors, each such individual, organization, or employing unit shall stand in the position of such predecessor with respect to the segregable a. . identifiable portion of the predecessor's separate account, actual contribution and benefit experience and annual payroll actually acquired, and each such individual, organization or employing unit shall be liable for current or delinquent contributions, interest and penalties of the predecessor in relative proportion to the part of the business acquired. Further, any successor under

this section shall pay contributions for the balance of the current rate year at the same contribution rate as the contribution rate of the predecessor whether such rate is more or less then two and seven-tenths per cent, provided there was only one predecessor or there were only predecessors with identical rates; if the predecessor rates were not identical, the successor's rates shall be the highest rate applicable to any of the predecessor employers with respect to the period immediately preceding the date of acquisition, an employer and there is a difference in the contribution rate established for such calendar year applicable to any acquired or acquiring employer, the division shall make a recalculation as of the date of acquisition of the contribution rate applicable to any successor employer based

upon the combined experience of all predecessor and successor employers or employing units, which revised contribution rate shall apply to employment after the date of any such acquisition. For this purpose a calculation date different from July first may be established. When the division has determined that a successor or successors stand in the position of a predecessor employer, the predecessor's liability shall be terminated as of the date of acquisition.

STATEMENT OF THE CASE

Petitioner, PoPeople, Inc., a Missouri corporation, acquired all of the assets of the two Missouri restaurant locations of another corporation, American Folks, Incorporated, on December 21, 1987, pursuant to the order of a Bankruptcy

Court dated December 18, 1987. In doing so, Petitioner assumed, acquired and continued substantially all the Missouri business of American Folks, Incorporated, and this qualified it to be treated as a successor in an on-going business, according to the terms of § 288.110, RSMo. Paragraph 8(h) on page 4 of the motion which was appended to that Bankruptcy Court order provided that taxes and accrued expenses were to be prorated between the buyer and debtor as of the closing date of the acquisition in December, 1987. Petitioner's President had worked with American Folks and its predecessor since February, 1984. At the time of the hearing before the Appeals Tribunal on the pending matter, the Independence restaurant had remained open for business continuously since late 1983. The Kansas City restaurant had opened in

September, 1983, and closed in September, 1988. Petitioner's President had arranged for Petitioner to acquire those two restaurants believing that Petitioner would enjoy the favorable contribution rates which the Respondent Division of Employment Security (DES) had assigned to the business prior to the acquisition, which were based on the employment history of that on-going business. The unemployment tax contributions which were paid as a result of those favorable contribution rates were, in fact, sufficient to protect Petitioner's employees.

When Petitioner acquired the two restaurants, Respondent DES notified Petitioner that it would treat Petitioner as a successor in all respects according to § 288.110 RSMo. Petitioner denied that it was a successor in all respects,

contending that the Bankruptcy Court order relieved it from any responsibility to pay its predecessor's debt, and that dispute was referred to an Appeals Tribunal of Respondent DES, which upheld Petitioner's contention in that regard. Respondent DES thereupon denied Petitioner the favorable unemployment tax contribution rates to which Petitioner had succeeded as successor in an ongoing business. Respondent DES had no reason to deny Petitioner those favorable contribution rates other than that its Appeals Tribunal had recently ruled that Petitioner was not liable for the delinquent contributions for which American Folks, Incorporated, remained liable pursuant to the order of the Bankruptcy Court.

Respondent DES mailed Petitioner a notice of liability on September 14, 1989. That notice of liability established

contribution rates for Petitioner as 2.70 percent for 1988 and 2.511 percent for 1989, revoking by implication the more favorable contribution rates for those two years which Petitioner had previously enjoyed when Respondent DES recognized Petitioner as successor in an on-going business. If Respondent DES had not changed its position but had continued to treat Petitioner with regard to the contribution rates as the successor of American Folks, Incorporated, Petitioner would have enjoyed more favorable rates, those being a rate of 1.60 percent in 1988 and 1.023 percent in 1989, as a result of the previous experience of American Folks, Incorporated.

Respondent DES contended that if Petitioner was to enjoy the favorable contribution rates, then Petitioner would have to shoulder the unpaid contributions,

interest and penalties of its predecessor, notwithstanding the order of the Bankruptcy Court to the contrary. Petitioner's position was that it was a successor to American Folks in all respects except one, that being with respect for those delinquencies for which American Folks remained liable pursuant to the Bankruptcy Court order. Petitioner further contended that Respondent DES had simply removed from its consideration some $63,475, which was the net contribution of this ongoing restaurant business, after subtracting from the gross contribution of the business the amount of the taxes for which American Folks remained liable to Respondent DES according to the order of the Bankruptcy Court.

On January 21, 1990, after a hearing in which Petitioner presented and preserved for review the constitutional

arguments which Petitioner presents herein as the first and second reasons that the petition for writ of certiorari ought to be granted, the Appeals Tribunal of Respondent DES affirmed the decision to impose the higher, less favorable contribution rates on Petitioner. In its written decision, the Appeals Tribunal made clear that Petitioner had failed to show that permitting Petitioner to enjoy the favorable contribution rates while as the same time avoiding liability for its predecessor's delinquent contributions would "enhance" the security of Petitioner's employees,[1] which is the basis for the third reason Petitioner presents herein to grant the petition for writ of certiorari.

On February 21, 1990, in response to

---

[1] See Appendix B at page 33.

Petitioner's Application for Review, the Respondent Labor and Industrial Relations Commission (LIRC) affirmed that decision of the Appeals Tribunal. The Trial Court affirmed the decision of Respondent LIRC. The Supreme Court of Missouri affirmed the judgment of the Trial Court.

REASONS FOR GRANTING THE WRIT

1.

The Missouri Supreme Court's holding that successorship under §288.110, RSMo, requires an all-or-nothing approach regardless of the effect on employment security violates Petitioner's rights to Due Process under Fourteenth Amendment, because the requirement bears no rational relationship to a legitimate state interest.

Denying Petitioner the favorable contribution rates it previously enjoyed bears no rational relationship to a legitimate state interest and therefore deprives Petitioner of property without

due process of law. The test of substantive due process is met if a statute has a rational relationship to a legitimate state interest. United States v. Carolene Products Co., 304 U.S. 144,152, 58 S. Ct. 778, 82 L.E.2d 1234 (1938); Blue Cross Hospital Service, Inc. v. Frappier, 681 S.W.2d 925, 930 [15] (Mo.banc 1984), readopted as published 698 S.W.2d 326 (Mo.banc 1985). Here the construction of § 288.110 which the Respondents promote admittedly has a rational relationship to a state interest, but that state interest is not legitimate. The legitimate intent of § 288.110 "is not to fill the coffers of the Commission treasury, but to view each case in such a manner that employees of a predecessor company are afforded protection against total loss in employment and wages." Acton Corporation v. Labor and Industrial

Relations Commission, 602 S.W.2d 53, 57 (Mo.App. 1980). The current construction bears no rational relationship to a legitimate state interest, for it would deny Petitioner the favorable contribution rates, which Petitioner earlier enjoyed as a successor, solely because Petitioner has been determined not to be liable for its predecessor's debt in bankruptcy. The test of substantive due process is not met here.

Instead, the legitimate state interests involved here, such as employment security and stability as explicated in cases such as Acton, are adequately met under circumstances such as those involved in this case without an all-or-nothing approach, and § 288.110, as the Missouri Supreme Court construed it and applied it here, therefore denies Petitioner substantive due process.

The Missouri Supreme Court's holding that successorship under § 288.110 RSMo, regarding unemployment tax contribution rates, requires an all-or-nothing approach regardless of the effect on employment security, so as thus to impose unfavorable rates upon a successor employer who declines to pay a predecessor's delinquency from which a Bankruptcy Court had relieved that successor employer of any responsibility, conflicts with the purpose of the Bankruptcy Code and violates 11 U.S.C. §525, making it invalid under the Supremacy Clause, Clause 2

in Article VI and under Clause 4 in Section 8 of Article I of the United States Constitution.

As applied here, §288.110, RSMo, conflicts with the purposes of the Bankruptcy Code and is therefore invalid under the Supremacy Clause, Clause 2 in Article VI of the United States Constitution and Clause 4, Section 8, in Article I of the United States Constitution.

In previous proceedings between Petitioner and Respondent DES, the same Appeals Tribunal had precluded Respondent DES from forcing Petitioner to pay the debt of Petitioner's predecessor, for which Petitioner's predecessor remained liable according to the order of the Bankruptcy Court but which remained

unpaid. Respondent DES then sought to coerce Petitioner into paying that same debt, by withholding the same favorable contribution rates which Respondent DES had previously assigned to Petitioner. Instead of accommodating the spirit and purpose of the bankruptcy law, the Appeals Tribunal erroneously held that Petitioner cannot "receive the favorable contribution rate treatment of the predecessor without paying for it; that is, without agreeing to be responsible for the accrued liability for unpaid contributions."[2]

The all-or-nothing approach to the benefits of successorship, which Respondents assert, conflicts with the Bankruptcy Code generally and with 11

---

[2] See Appendix B at page 33.

U.S.C. § 363 particularly.[3] One of the primary purposes of the Bankruptcy Code is to give debtors new opportunity and "a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Perez v. Campbell, 402 U.S. 637, 648, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). Sales free and clear of interests in the property, under 11 U.S.C. § 363, facilitate that purpose by realizing funds for general creditors, so that the creditors might be paid, and that purpose requires that bankruptcy courts,

---

[3] "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." Perez v. Campbell. 402 U.S. 637, 644, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). The Missouri Supreme Court expressly adopted the "all-or-nothing" construction of § 288.110. See page 21 of Appendix A.

in arranging sales such as the one here, not be fettered by attempts on the part of state agencies to coerce unsuspecting purchasers into assuming liabilities of which they were relieved in the bankruptcy proceeding. This would tend to discourage such purchases, so that creditors would be less likely to be paid. Furthermore, there is nothing about a sale free and clear of interests in the property under 11 U.S.C. § 363, such as the one arranged here, which should prevent transferring the predecessor's contribution rate to the successor. See In re Wolverine Radio Co., 930 F.2d 1132, 1147 (6th Cir. 1991), where the Michigan employment security commission succeeded in applying the predecessor employer's less favorable contribution rate to the successor

employer.[4] Thus, a conflict exists between § 288.110 and the Bankruptcy Code. There is no question how this conflict is to be resolved, because "the supremacy of the federal bankruptcy laws, enacted pursuant to § 8 of Article I of the Constitution of the United States, is clearly established." Kesler v. Department of Public Safety, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641; Fix v. Automobile Club Inter-Insurance Exchange, 413 S.W.2d 194, 196[4] (Mo. 1967). Therefore, the conflict must be resolved in favor of the Petitioner.

Denying Petitioner the favorable contribution rates it has previously

---

[4] In Wolverine the employees' security required the less favorable contribution rate, but there is no reason to believe that successorship to a contribution rate under a sale free and clear of interests in the property under 11 U.S.C. § 363 should be permitted only where it is required for the employees' security.

enjoyed also violated 11 U.S.C. § 525, which provides for protection against discriminatory treatment for bankrupts and associates of bankrupts, and is therefore impermissible under the Supremacy Clause, Clause 2 in Article VI of the United States Constitution. That statute applies to the situation here, because a governmental unit (Respondent DES) has revoked, suspended, refused to renew and conditioned a grant similar to a license, permit, charter or franchise (the favorable contribution rates of Petitioner's predecessor) and has discriminated with respect to such a grant against Petitioner, which is a person who has been associated with a debtor or bankrupt (the debtor or bankrupt being Petitioner's predecessor, American Folks, Incorporated, and the association being that Petitioner is headed by an insider

with American Folks and that Petitioner purchased what was substantially all of the assets of American Folks and is, as Respondent DES previously contended, the successor of American Folks), solely because such bankrupt or debtor is or has been a debtor under the Bankruptcy Code and neither such bankrupt or debtor nor Petitioner has paid a debt that is dischargeable in the case under the Bankruptcy Code (which is the debt of American Folks for delinquent contributions which Respondent DES attempted to force Petitioner to pay).

As Respondent DES repeatedly admitted, the sole reason for denying Petitioner the favorable contribution rate to which its predecessor's experience and its own experience and circumstances entitled it was that Petitioner was found by the Appeals Tribunal not to be liable

as a successor for the delinquent contributions of its predecessor, a Chapter 11 debtor with whom Petitioner associated. Petitioner's refusal to pay those delinquent contributions clearly was the substantial motivating factor in the decision of Respondent DES to increase Petitioner's contribution rates and to assign Petitioner a new account, as if Petitioner were a new employer.

Petitioner's refusal to pay the delinquent contributions of Petitioner's predecessor had no adverse effect on the security of Petitioner's employees, and neither did the Appeals Tribunal's previous decisions that Petitioner was not obliged to pay those delinquent contributions.

Respondent DES thus discriminated against Petitioner, in violation of 11 U.S.C. § 525, by increasing Petitioner's

contribution rates and assigning Petitioner a new account, as if Petitioner were a new employer. See In re The Bible Speaks, 69 B.R. 368, 373 [5] (Bank.D.Mass. 1987), where the bankruptcy court concluded that the legislative history of §525(a) indicates

> that a governmental unit may act based upon a financial requirement imposed upon a debtor in two narrow instances: (1) where the financial requirement is not based upon the debtor's solvency before discharge, the debtor's bankruptcy, or the debtor's failure to pay a dischargeable debt; or (2) even though the financial requirement is based upon the debtor's solvency before discharge, the debtor's bankruptcy, or the debtor's failure to pay a dischargeable debt, but only if the requirement is not the substantial motivating factor in the decision to act. Id.

Here the substantial, and indeed the only, motivating factor in the decision of Respondent DES to act with respect to the favorable contribution rate which Petitioner had previously enjoyed was

Petitioner's failure to pay a dischargeable debt.[5] It follows that the action here of Respondent DES, in denying Petitioner the favorable contribution rates, was a violation of 11 U.S.C. § 525. See also Parker v. Contractors State License Board, 187 Cal.App.3d 207, 231 Cal.Rptr. 577, 579 (1986) (holding that § 525 is triggered if non-payment of a discharged debt is the sole reason for the agency action).

---

[5] Cases such as In re Rees, 61 B.R. 114 (Bank. D.Utah 1986), which involved an individual debtor and his tax debt, are distinguishable, in that his tax debt was nondischargeable because he was not a corporation. Id. at 124 n.21.

3.

The Appeals Tribunal of the Division of Employment Security, the Labor and Industrial Relations Commission, the Trial Court, and the Missouri Supreme Court, erred in holding that Petitioner, without notice of any such burden, must show that retaining the favorable contribution rates would enhance the employment security of Petitioner's employees, rather than that it would merely maintain their employment security.

The Appeals Tribunal of the Division of Employment Security, the Labor and

Industrial Relations Commission, the Trial Court, and the Missouri Supreme Court erred in holding that Petitioner must show that retaining the favorable contribution rates would enhance the employment security of Petitioner's employees, rather than merely that it would maintain their employment security.

Construing the statute to apply such a burden of proof does not tell how much enhancement of security is needed, by what means the enhancement was to be shown or within what time limits was the enhancement was to take place, and that construction therefore violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Western & Atlantic Railroad v. Henderson, 279 U.S. 639, 642, 49 S.Ct. 445, 447, 73 L.Ed.2d 884 (1929); cf. State ex rel Cook v. Saynes, 713 S.W.2d 258, 262[7] (Mo.banc

1986). The denial of Due Process evolves from the uncertainty of how much enhancement is needed, by what means it must be shown, and within what time limits it must occur. The lack of notice that any such enhancement must be shown and the absence of any statutory requirement to effect any such enhancement are at odds with basic notions of fundamental fairness. It was fundamentally unfair to surprise Petitioner after the fact-finding hearing was concluded with this novel burden of showing enhanced employment security, since the lack of notice and time to prepare would heavily favor Respondent DES. But it would have also been fundamentally unfair to require Petitioner to shoulder this burden even if notice had been given, because the burden is impermissibly vague. Therefore, Petitioner's rights under the Due Process

Clause of the Fourteenth Amendment of the United States Constitution were violated.

CONCLUSION

For each and every one of the foregoing reasons, this petition for writ of certiorari should be granted.

NEWHOUSE, BYERS & SWANEY, P.C.

By: James O. Swaney, Jr.

James O. Swaney, Jr. (#23706)
304 West Walnut, Suite 210
Independence, MO 64050-3883
Telephone (816) 833-3000
Telefacsimile (816) 833-3733
ATTORNEYS FOR PETITIONER

APPENDIX A

Supreme Court of Missouri
en banc

PoPEOPLE, INC.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 74070
	)	
LABOR AND INDUSTRIAL RELATIONS COMMISSION and DIVISION OF EMPLOYMENT SECURITY,	)	
	)	
Defendants-Respondents.	)	

APPEAL FROM
THE CIRCUIT COURT OF COLE COUNTY
Honorable James F. McHenry, Judge

PoPeople, Inc., appeals from a decision of the Circuit Court of Cole County affirming the decision of the Labor and Industrial Relations Commission regarding the Missouri employment security laws. The Commission decided that PoPeople is not the successor to American Folks, Inc., under § 288.110, RSMo 1986, and, therefore, not entitled to favorable

contribution rates for unemployment compensation tax. This Court has exclusive appellate jurisdiction because PoPeople challenges the validity of § 288.110 as construed thus far in this litigation. The judgment is affirmed.

PoPeople, Inc., a Missouri corporation, acquired two restaurant locations from American Folks, Inc., on December 21, 1987. The restaurants were located in Independence, Missouri, and Kansas City, Missouri.

Section 288.110 specifies an employer that acquires substantially all of the business of another employer will be treated as the successor in interest to the predecessor employer and to what extent, if any, the successor in interest will receive the benefits and be subject to the burdens of the predecessor employer

in relation to the unemployment compensation matters. Section 288.110 provides, in pertinent part:

> Any individual, type of organization or employing unit which has acquired substantially all of the business of an employer, excepting in any such case any assets retained by such employer incident to the liquidation of his obligations, and in respect to which the division finds that immediately after such change such business of the predecessor employer is continued without interruption solely by the successor, shall stand in the position of such predecessor employer in all respects, including the predecessor's separate account, actual contribution and benefit experience, annual payrolls, and liability for current or delinquent contributions, interest and penalties.

On February 6, 1986, American Folks filed a voluntary petition in bankruptcy in the United States Bankruptcy Court of the Northern District of Georgia. This bankruptcy was pending when PoPeople

acquired the two restaurants, and American Folks, by written motion, asked the bankruptcy court to approve the six-page sales agreement providing for the sale of the two restaurants. On December 18, 1987, the bankruptcy court issued its order granting American Folks the right to enter into and approving the purchase agreement, which provided, among other things, that "[a]ll taxes and accrued expenses are to be prorated between Buyer and Debtor as of the closing date...." The closing date was December 21, 1987, and PoPeople, therefore, took the position that it was not liable for approximately $13,385.00 of unpaid unemployment contributions for the two restaurants that had accrued prior to the closing date. However, the Missouri Division of Employment Security (Division) made an

administrative determination that PoPeople acquired and continued substantially all of the business of American Folks, stood in the position of American Folks pursuant to § 288.110, and therefore was liable for all of the unpaid contributions. This issue was referred to the Appeals Tribunal of the Department of Labor and Industrial Relations and, on February 23, 1989, it heard the appeal by telephone conference. The Appeals Tribunal issued its decision on July 21, 1989, reversing the Division's administrative "successorship" determination and held that PoPeople would not be liable for the prior unpaid contributions and that PoPeople shall not stand in the position of American Folks in all respects as provided under § 288.110. In its holding, the Appeals Tribunal referred to the authority of the

bankruptcy court to sell the two restaurants and its approval of the purchase agreement. The decision of the Appeals Tribunal further stated:

> In this case, the "closing date" in question was December 21, 1987, and it therefore follows that any delinquent contributions which became payable during time periods pre-dating December 21, 1987, remained obligations of the debtor-in-possession, American Folks, Inc., and did not transfer to the appellant along with the appellant's acquisition of certain assets purchased from the debtor-in-possession in the bankruptcy proceedings. According to this judicially approved sale of assets made pursuant to federal law, the appellant, PoPeople, Inc., shall not succeed to the liability for unpaid contributions which accrued prior to December 21, 1987. As to those delinquent contributions, the appellant shall not stand in the position of American Folks, Inc., by operation of federal law....
>
> It is found by the Appeals Tribunal that the appellant argues correctly that the

> conflicting laws of the State of Missouri must yield to the paramount federal statutory authority by reason of the "Supremacy Clause" contained in Article VI, section 2 of the United States Constitution. Because the Bankruptcy Court Order in this case refers to the proration, as of the closing date of December 21, 1987, of "[a]ll taxes", all of the other elements of "successorship" under Section 288.110, RSMo, which relate to the pre-sale contribution and benefit experience of American Folks, Inc., must likewise be restricted in their application to the appellant so as not to conflict with that Bankruptcy Court Order. Accordingly, it is found that PoPeople, Inc., shall not stand in the position of American Folks, Inc., in all respects as provided under Section 288.110, RSMo 1986.

Decision of Appeals Tribunal in Appeal No. E-454-88, dated July 21, 1989, pp. 7 and 8. PoPeople did not appeal this decision of the Appeals Tribunal and, therefore, it became final on August 5, 1989.

The present controversy commenced on

September 14, 1989, when the Division mailed a notice of liability to PoPeople. The notice established PoPeople's contribution rates as 2.70 percent for 1988 and 2.511 percent for 1989.[1] The notice demonstrated that the Division had administratively determined, based upon the Appeal Tribunal's first decision that PoPeople was a "new employer" subject to the Missouri Employment Security Law, effective January 1, 1988. The notice also assigned a different account number to PoPeople.

---

[1] The division chose 2.70 percent as PoPeople's contribution rate for 1988 pursuant to § 288.090.2 RSMo Supp. 1991, which applies to "new" employers. In accordance with § 288.122, RSMo Supp. 1991, the Division established 2.511 percent as PoPeople's contribution rate for 1989. Section 288.122 allows for a seven-percent reduction in the percentage of the contribution rate under certain circumstances.

On September 22, 1989, PoPeople appealed the determination of its contribution rates. A hearing was held before the Appeals Tribunal on November 28, 1989. PoPeople contended that it was still entitled to the lower, more favorable contribution rates as a successor to American Folks in all respects except that it was not liable for delinquent contributions for which American Folks remained liable pursuant to the bankruptcy court order.

On January 3, 1990, the Appeals Tribunal affirmed the decision to impose the higher contribution rates on PoPeople. The Appeals Tribunal concluded that the various aspects of successorship cannot be separated and that a successor must inherit the entire package of burdens and benefits from its predecessor. PoPeople

then sought review with the Labor and Industrial Relations Commission (Commission). On February 21, 1990, the Commission affirmed the decision of the Appeals Tribunal. Thereafter, PoPeople appealed to the Circuit Court of Cole County, which affirmed the decision of the Commission on July 2, 1991.

PoPeople now seeks review in this court. PoPeople argues that it is entitled to have the benefits of the statute (its predecessor's favorable benefit experience and resulting lower contribution rates) without being required to accept the burden of the statute (liability for American Folks' delinquent contributions). PoPeople contends that it is entitled to the benefits because it is, in fact, the successor in interest to American Folks because the Missouri

statute (§ 288.110) must yield to the paramount statutory authority by reason of the "Supremacy Clause" contained in Article VI, Section 2, of the United States Constitution.

Surprisingly, the Division does not argue the converse of PoPeople's position, *i.e.* it does not, in its brief or in its argument, take the position that the statute intends an all-or-nothing interpretation, which requires that a successor in interest take on both the burdens and the benefits of the predecessor. The division took what some might describe as a "head-in-the-sand" approach by refusing to either brief or argue the substantive issue of the interpretation of the statute and stubbornly maintains that the Appeals Tribunal in the present case did not

consider the issue of how the statute should be interpreted. Rather, the Division maintains that in the first appeal the Appeals Tribunal held that an all-or-nothing interpretation is required, that PoPeople did not appeal from this decision, and that this holding, in effect, constitutes *res judicata* on the statutory interpretation issue. Reference to the Appeals Tribunal's opinion, which discusses the all-or-nothing interpretation issue for five pages, would cause a neutral observer to wonder if the Division and the other participants, including this Court, are reviewing the same opinion. The first decision of the Appeals Tribunal does contain a sentence that could be read as an all-or-nothing interpretation. *See* the quotation, *supra*, from the decision of Appeals Tribunal in

Appeal No. E-454-88. However, the issue of carrying over the favorable contribution rates from American Folks to PoPeople was not at issue in the earlier decision. Thus, PoPeople could not have appealed from that portion of the earlier decision because the Division had not issued a notice of liability so as to put the contribution rates at issue in that appeal.

Moreover, the most cursory review of the opinion of the Appeals Tribunal in the present appeal demonstrates beyond question that in the present case the Appeal Tribunal considered the substantive issue of how the statute should be interpreted and did not decide the case based on *res judicata*. Consider the following quoted from the Appeal Tribunal's opinion below:

PoPeople, Inc., has appealed from the Division's administrative determination of its contribution rates for calendar years 1988 and 1989, based upon its belief that it is still entitled to the lower, more favorable contribution rates and account experience with American Folks, Inc., notwithstanding the Appeals Tribunal's decision reversing the Division's "successorship" determination. While the appellant still continues to assert, as it did during its appeal of the Division's "successorship" determination, that it should not stand in the position of American Folks, Inc., with regard to that company's liability for current or delinquent contributions, interest and penalties, the appellant nevertheless contends that it should be allowed to benefit of that prior owner's actual contribution and benefit experience and annual payrolls, as reflected in the assigned contribution rates for calendar years 1988 and 1989.

* * *

Essentially, the appellant urges the Appeals Tribunal to find that the various aspects of employer liability which are

> transferred from a predecessor employer to a successor employer by operation of RSMo. Section 288.110, may be segregated from one another and separated out. This view, if upheld, would allow a subsequent operator of a business to inherit some, but not all, of the various aspects of "successorship".
>
> * * *
>
> Because the Appeals Tribunal is not persuade that the Law will allow for the "severability" of the various aspects of successorship listed in Section 288.110, it is held that the appellant's prayer for the lower, more favorable contribution rates which would have been assigned to American Folks, Inc., for calendar years 1988 and 1989, must be rejected.

As lengthy as the foregoing quotation is, we have omitted several pages of the Appeals Tribunal's opinion discussing further aspects of this issue.

Despite the express language in the holding of the Appeals Tribunal, the Division maintains that this appeal does

not involve the issue of the interpretation of the statute. Its position is that PoPeople is a new employer and that the only question is whether the Division properly followed the statutes and regulations and assessed the proper contribution rate for a new employer. This approach renders the real issue in the present appeal a non-issue.

PoPeople argues in its Reply Brief that the Division's failure to brief and argue the obvious issue in dispute amounts to a default in the nature of failing to file a responsive pleading to a petition. While such a conclusion is tempting, where appellant files a brief raising the appropriate issue, the Court is obligated to consider the substance of the claim. Failure of a respondent to brief an appropriate issue is a practice repeatedly

condemned by the courts. It is an imposition upon this Court and leaves us dependant upon the appellant's presentation and our own research. Scheble v. Missouri Clean Water Commission, 734 S.W.2d 541, 545 (Mo. App. 1987). However, this court must consider whether § 288.110 may be subjected to a bifurcated interpretation by which, under the present circumstance, an employer may receive the benefits but avoid the burdens of being a successor in interest, or whether, on the other hand, the statute calls for the dispensation of the attributes of successorship on a all-or-nothing basis.

Although this is a case of first impression regarding the severability of aspects of successorship listed in § 288.110, the plain meaning of the statute

requires that a successor assume all of the benefits and burdens of its predecessor. Further, several cases interpreting this section have suggested that the aspects of successorship are not severable. The court of appeals in Mascom Management, Inc. v. Labor and Industrial Relations Commission, 586 S.W.2d 802, 806 (Mo. App. 179), found that the legislature intended to make "the question of successorship turn upon the actuality of transfer of benefits and burdens of a prior business." (Emphasis added.) The Mascom court based its finding on three prior cases: Union-May-Stern Co. v. Industrial Commission, 273 S.W.2d 766 (Mo. App. 1954), Chief Freight Lines Co. v. Industrial Commission, 366 S.W.2d 48 (Mo. App. 1963), and KSD/KSD-TV, Inc. v. Labor and Industrial Relations Commission, 562

S.W.2d 346 (Mo. banc 1978). The Mascom court further explained:

> the statute protects the basic integrity of the employment security system by providing a means of collection of delinquent accounts when the business enterprise is ongoing and the benefits and burdens have been assumed by another. So likewise, when the shoe is on the other foot and the transferee is asserting a right to the lower rate established by the transferor, if the transferee has assumed the benefits and burdens of the prior operation in whatever form and however conveyed, it is equitable and in furtherance of the statutory purpose to stabilize conditions of the employment to permit the transferee to obtain the lower rate of contribution and any value in the predecessor's account. this is done for the reason that the whole purpose of the system is to provide continuity and stability in employment. The incentive to a transferee, to continue uninterrupted and without decrease in employment the enterprise transferred, is the expectation of the lowered rate of contribution. Put another

> way, interpretation of the statute which emphasizes the necessity for stability in employment and the protection of the State's interest in collection of delinquent accounts, and which is based upon a realistic appraisal of the business situation, accomplishes the basic legislative goals.

(Emphasis added.) Mascom, 586 S.W.2d at 806.

In Mascom, Mascom Management Corporation, Inc., merely leased the abandoned premises that Washington and Twelfth Corporation had previously operated; there was no contract or transfer of assets, benefits or burdens between Mascom and Washington and Twelfth. The court of appeals held that Mascom was not a successor to Washington and Twelfth. The court concluded that "absent an assumption of the burdens of [the predecessor] and the prospective benefits,

no one could have claimed the right to a favorable rate had one existed." Id. at 807.

Consistent with the language of the court in Mascom, we adopt the "all-or-nothing" construction of § 288.110. In other words, if a successor receives the favorable aspects of successorship, it must pay for them by assuming the unfavorable aspects. Any other reading of § 288.110 would be inconsistent with the statutory purpose and would allow a successor to assume some, but not all, of the various aspects of successorship listed in the statute.

We hold that § 288.110 does not allow the aspects of successorship to be severed. Therefore, because PoPeople did not assume the burdens of American Folks, it is not a successor as contemplated by §

288.110 and may not receive the benefit of the lower, more favorable contribution rates.

We will now examine PoPeople's constitutional issues. First, PoPeople asserts that construing § 288.110 to deny it the favorable contribution rates violates both procedural and substantive due process under the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution. In its procedural due process argument, PoPeople contends that the decisions below place an improper burden of proof upon PoPeople to show specifically that in this particular circumstance that the favorable contribution rates of its predecessor would enhance the employment security of the workers. The opinions below did not

turn upon nor even require any showing as to whether the use of the favorable contribution rates in this particular case would enhance, maintain or be detrimental to the employment security of the workers. To base the interpretation of the statute, as an all or nothing statute, on the specific financial data applicable to any particular transaction would result in interpreting the statute, which is obviously general on its face, to mean one thing in one circumstance and something else in another. The decisions below did not require and were not based upon such a showing; PoPeople's procedural due process argument is without merit.

PoPeople also claims in its substantive due process argument, that the statute, as construed, has no rational relationship to a legitimate state

interest. To argue that the state has no legitimate interest in the formulation of a consistent approach to collecting unemployment contributions in the circumstances of the transfer and continuation of a business is, itself, an irrational contention. The State obviously has a legitimate interest in protecting employment security (including collecting unpaid contributions), and the legislature enacted § 288.110 as one means of achieving this interest. Therefore, we hold that construing the statute to deny PoPeople the lower, more favorable contribution rates of its predecessor does not violate substantive due process.

Second, PoPeople argues that construing § 288.110 so as to deny it the favorable contribution rates violates the Supremacy Clause, Article VI, Clause 2 of

the United States Constitution, because it conflicts with the bankruptcy code, and violates the provision requiring uniform bankruptcy laws throughout the United States, Article I, Section 8, Clause 4 of the United States Constitution. PoPeople suggests that such a construction of § 288.110 violates 11 U.S.C. § 525, which protects against discriminatory treatment of bankrupts and associates of bankrupts. PoPeople asserts that § 525 applies to the present case because the Division conditioned the grant of the favorable contribution rates on its assumption of American Folks' burdens and discriminate against it, an associate of a bankrupt, because neither PoPeople nor American Folks paid the dischargeable debt.

Our construction of § 288.110 does not violate either provision of the

Constitution. PoPeople and American Folks executed a purchase agreement that was approved by the bankruptcy court. The agreement provided for a proration of all taxes and accrued expenses between the buyer and the debtor as of the closing date. While PoPeople was free to negotiate such a term, it also remained subject to the requirements of § 288.110. Therefore, we conclude that construing § 288.110 so as to impose the contribution rates of a new employer on PoPeople does not violate the above-cited provisions.

Finally, PoPeople argues that the Circuit Court erred in failing to overturn the Commissioner's refusal to grant its application for a stay or supersedeas under § 288.200, RSMO 1986. The denial of the stay or supersedeas required PoPeople to pay the difference between the

favorable contribution rates to which it contended it was entitled and the unfavorable contribution rates which the Division asserted should apply. The difference was approximately $12,000.000. PoPeople alleges that the Commission denied its property without an opportunity to be heard in violation of the Due Process Clauses of Article I, Section 10, of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution. Section 536.120, RSMo 1986, places the issuance of a stay in the discretion of the agency. The section provides that "[n]o such stay . . . shall be granted by a reviewing court without notice, except in cases of threatened irreparable injury." Generally, "mere injuries in terms of money . . . necessarily expended in the absence of a

stay [does] not form a basis for a conclusion of irreparable injury. 73A C.J.S. Public Administrative Law and Procedure § 195 (1983). Common sense dictates this conclusion because if money is paid and later determined not to have been due, it can be refunded with interest. Moreover, even if the stay had been granted so that the payment by PoPeople would have been delayed, when the issue was finally determined and PoPeople was required to pay the contribution it would be required to pay interest on the unpaid balance during the time the stay was in place. § 288.150, RSMo 1986. It is conceivable that in very unique circumstances a failure to stay the payment of money could result in irreparable injury, but PoPeople does not plead facts that could give rise to this

possibility in this instance. Thus, PoPeople was not entitled to a stay or supersedeas because its only injury was monetary. Further, Section 536.120 requires the agency to give notice and conduct a hearing only if it grants a stay. PoPeople cites no authority that requires notice and a hearing when the stay is denied. The Circuit Court did not err in refusing to overturn the Commission's refusal to issue PoPeople's application for stay or supersedeas.

Because § 288.110 requires the assumption of both the benefits and burdens of the predecessor by the successor employer, PoPeople cannot receive the lower, more favorable contribution rates without assuming the liability for the delinquent contributions of American Folks. The judgment is

affirmed.

ELWOOD L. THOMAS, Judge

ROBERTSON, C.J., COVINGTON, HOLSTEIN, BENTON, J.J., RENDLEN and BLACKMAR, Sr.JJ., concur. PRICE, J., not participating because not a member of the Court when the case was submitted.

APPENDIX B

MODES-3840(10-85)
APPEALS
DES-BAP001D(10-85)
State of Missouri E-329-89

DIVISION OF EMPLOYMENT SECURITY

Jefferson City Acct. NO. 576776-0

DECISION OF APPEALS TRIBUNAL

In the Matter of the contribution rate under the Missouri Employment Security Law of PoPeople, Inc., for calendar years 1988 and 1989 and all other issues incident thereto.

On September 14, 1989, the Division determined administratively that, effective January 1, 1988, PoPeople, Inc., a corporation, became a new "employer" subject to the Missouri Employment Security Law, and that the contribution rates for Po People, Inc., are 2.700 percent for calendar year 1988 and 2.511 percent for administrative determination.

After due notice to the interested parties, the Appeals Tribunal heard the

appeal on November 28, 1989, in Kansas City, Missouri. The appellant's president, David Herl, was present and testified on behalf of the appellant. The appellant was represented by James O. Swaney, Jr., Esq. Field auditor Bill Whitt was present and testified for the Division.

FINDINGS OF FACT:

For an unspecified time period, as many as 14 separate restaurants nationwide were operated by a corporation known as American Folks, Inc., formerly known as JH Restaurants, Inc. American Folks, Inc., was a franchisee of Po Folks, Inc., and owned and operated a number of "Po Folks" restaurants in various states. However, on February 6, 1986, American Folks, Inc., filed a voluntary petition in bankruptcy pursuant to Chapter 11, Title 11 of the United States Code. This petition in bankruptcy was filed in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (Case No. 86-

00920-WHD).

On December 18, 1987, the Debtor in bankruptcy, American Folks, Inc., by and through its attorneys of record, filed with the United States Bankruptcy Court its Motion to sell two of its restaurants; one located in Independence, Missouri and another located in Kansas City, Missouri. That Motion was filed pursuant to 11 U.S.C. Section 363 and Rules 6004 and 9013 of the Rules of Bankruptcy Procedure. In its written Motion, American Folks, Inc., set forth the fact that both of said restaurants were accompanied by real estate and equipment leases and contained various items of equipment, inventory, smallware and cash on hand. In said Motion, American Folks, Inc., asked the Bankruptcy Court to approve a six-page sales agreement whereby it wished to sell to one David Herl, or to a corporation of which Mr. Herl was to become a principal stockholder, its leases and restaurants referenced in said agreement. As a part

of said agreement, paragraph 8(h) therein specifically stated that, "[a]ll taxes and accrued expenses are to be prorated between Buyer (David Herl or his corporation) and Debtor (American Folks, Inc.) as of the closing date;....."

On December 18, 1987, United States Bankruptcy Judge W. Homer Drake, Jr., issued his Order granting American Folks, Inc., the right to enter into a purchase agreement with David Herl or a corporation of which he is the principal stockholder, as set forth in the Motion of American Folks, Inc., to sell it Independence, Missouri and Kansas City, Missouri Restaurants. Said Order granted to American Folks, Inc., the Court's permission to enter into any other agreement consistent with the aforementioned Motion. Consequently, pursuant to that Order of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, dated December 18, 1987, the appellant,

PoPeople, Inc., acquired the two restaurants in question; one in Independence, Missouri and one in Kansas City, Missouri. The United States Bankruptcy Court authorized the sale of those bankruptcy estate assets pursuant to the authority of 11 U.S.C. Section 363(f). The "closing date" referred to in the aforementioned Motion, approved by Order of the Bankruptcy Court, was December 21, 1987. David Herl is the president and principal stockholder of PoPeople, Inc.

On December 30, 1987, the chief accountant for American Folks, Inc., conferred with an unknown employee of the Missouri Division of Employment Security and told that Division employee that, effective December 20, 1987, American Folks, Inc. (Employer Account No. 241071), had sold its entire business to the appellant, PoPeople, Inc. Consequently, on December 31, 1987, the Division made its administrative determination that PoPeople, Inc., acquired and substantially

all of the business of American Folks, Inc., further determining that PoPeople, Inc., was an "employer" subject to the Missouri Employment Security Law and stood in the position of American Folks, Inc., in all respects, including and separate account, actual benefit and contribution experience, annual payrolls, and liability for current or delinquent contributions, interest and penalties, and contribution rate of American Folks, Inc., as provided under RSMo. Section 288.110. Said administrative determination was on its face made effective December 20, 1987. The administrative determination letter was mailed to the address of the appellant's accountant on December 31, 1987.

Because of a lack of communication between the appellant's accountant and the appellant's president, the president did not actually succeed in seeing a copy of the aforementioned successorship determination letter until October, 1988.

This was after the president received from the Division on September 20, 1988, letter telling him that he could request the Division to make a "redetermination" on the successorship issue.

After conferring with legal counsel, the appellant filed on October 18, 1988, by and through that legal counsel, its written appeal from the aforementioned successorship determination, stating therein its reason for disputing that determination. After further correspondence between the appellant's legal counsel and the Division, the matter of the successorship determination was referred to the Appeal Tribunal for the scheduling of a hearing on the matter. Subsequently, the Appeals Tribunal deemed it appropriate to receive evidence both on the issue of the timeliness of the appellant's appeal, as well as on the merits of the successorship determination itself.

After due notice to the interested

parties, the Appeals Tribunal heard the appeal by means of a telephone conference originating from Jefferson City, Missouri, on February 23, 1989. The appellant's president, David Herl, testified on behalf of the appellant. The appellant was represented in the hearing by James O. Swaney, Jr., Esq., and Ronald G. Byers, Esq. Contributions supervisor George Holland testified for the Division. There was no appearance on behalf of American Folks, Inc.

On July 21, 1989, the Appeals Tribunal issued its decision in the matter, reversing the Division's administrative "successorship" determination. The Decision of Appeals Tribunal (in Appeal No. E-454-88) held that PoPeople, Inc., shall not stand in the position of American Folks, Inc., in all respects as provided under Section 288.110, RSMo. 1986.

In holding as it did that the administrative "successorship"

determination should be reversed, the Appeals Tribunal set forth its analysis and conclusions for such a holding, portions of which are set forth below:

> The Bankruptcy Court had authority to sell the two Missouri restaurants previously owned and operated by American Folks, Inc., the debtor-in-possession, free and clear of specifics interests such in liens, either under 11 U.S.C. Section 363(f) or pursuant to its general equitable powers and its duty to distribute the assets of the Chapter 11 debtor. In re the White Motor Credit Corporation, 75 Bankr. 944, 948 (Bankr. N.D. Ohio 1987). The Bankruptcy Court exercised that authority in its Order of December 18, 1987, granting the debtor-in-possession "the right to enter into a purchase agreement with David Herl or a corporation of which he is the principal stockholder as set forth in Debtor's Motion to Sell Its Independence, Missouri and Kansas City, Missouri Restaurants and to enter into any other agreement consistent with said Motion." That Motion, in turn, provided in paragraph 8(h) that "[a]ll taxes and accrued expenses are to be

prorated between Buyer and Debtor as of the closing date,...."

In this case, the "closing date" in question was December 21, 1987, and it therefore follows that any delinquent contributions which became payable during time periods pre-dating December 21, 1987, remained obligations of the debtor-in-possession, American Folks, Inc., and did not transfer to the appellant along with the appellant's acquisition of certain assets purchased from the debtor-in-possession in the bankruptcy proceedings. According to this judicially approved sale of assets made pursuant to federal law, the appellant, PoPeople, Inc., shall not succeed to the liability for unpaid contributions which accrued prior to December 21, 1987. As to those delinquent contributions, the appellant shall not stand in the position of American Folks, Inc., by operation of federal law....

It is found by the Appeals Tribunal that the appellant argues correctly that the conflicting laws of the State of Missouri must yield to the paramount federal statutory authority by reason of the

> "Supremacy Clause" contained in Article VI, Section 2 of the United States Constitution. Because the Bankruptcy Court Order in this case refers to the proration, as of the closing date of December 21, 1987, of "[a]ll taxes", all of the other elements of "successorship" under Section 288.100 RSMo, which relate to the pre-sale contribution and benefit experience of American Folks, Inc., must likewise be restricted in their application to the appellant so as not to conflict with that Bankruptcy Court Order. Accordingly, it is found that PoPeople, Inc., shall not stand in the position of American Folks, Inc., in all respects as provided under Section 288.100, RSMo 1986.

Decision of Appeals Tribunal in Appeal No. E-454-88, dated July 21, 1989, pages 7 and 8.

The aforementioned Decision of Appeals Tribunal in Appeal No. E-454-88 was not appealed from further by PoPeople, Inc. Instead, the appellant allowed that Decision to become final.

Subsequently, on September 8, 1989, the

Division mailed a letter to the appellant indicating that a new employer account number would be assigned to the appellant. Inasmuch as it read the Decision of Appeals Tribunal to mean that the appellant was in no way a "successor" to American Folks, Inc., under the provisions of RSMo. Section 288.110, the Division determined administratively, on September 14, 1989, that PoPeople, Inc., was a new "employer" subject to the Missouri Employment Security Law, effective January 1, 1988.

Because it believed that the prior "successorship" determination had been completely reversed in all respects, the Division treated the appellant as a new employer, assigned a new account number to the appellant and also assigned the appellant a contribution rate for calendar year 1988 applicable to a new employer: 2.700 percent. The Division chose that contribution rate for a "new" employer in accordance with its decision to apply to

the appellant the Division administratively determined that said contribution rate should be statutorily reduced in accordance with the provision of RSMo. Section 288.122, which calls for a seven-percent reduction in the percentage of the contribution rate under certain circumstances. Thus, this resulted in an administratively determined contribution rate for the appellant of 2.511 percent for calendar year 1989.

PoPeople, Inc., has appealed from the Division's administrative determination of its contribution rates for calendar years 1988 and 1989, based upon its belief that it is still entitled to the lower, more favorable contribution rates and account experience of American Folks, Inc., notwithstanding the Appeals Tribunal's decision reversing the Division's "successorship" determination. While the appellant still continues to assert, as it did during its appeal of the Division's "successorship" determination, that it

should not stand in the position of American Folks, Inc., with regard to that company's liability for current or delinquent contributions, interest and penalties, the appellant nevertheless contends that it should be allowed the benefit of that prior owner's actual contribution and benefit experience and annual payrolls, as reflected in the assigned contribution rates for calendar years 1988 and 1989.

If the Division's prior "successorship" determination had remained unaltered, the Division would have assigned the appellant the same contribution rates that it would have assigned American Folks, Inc., for calendar years 1988 and 1989; those rates would have been 1.60 percent and 1.023 percent, respectively. This disagreement over the proper contribution rates to establish for the appellant is the reason for the appellant's appeal from the Division's "employer" liability determination dated September 14, 1989.

The appellant does not dispute the notion that it has been an "employer" subject to the Missouri Employment Security Law at all times since January 1, 1988.

On November 15, 1989, the Division determined administratively that the appellant's contribution rate for calendar year 1990 is 2.418 percent.

LAW:

The Missouri Employment Security Law, Chapter 288, RSMo 1986, as amended, provides in part as follows:

288.090.2. As of June thirtieth of each year, the division shall establish an average industry contribution rate for the next succeeding calendar year for each of the industrial classification divisions listed in the Standard Industrial Classification Manual furnished by the federal government. The average industry contribution rate for each standard industrial classification division shall be computed by multiplying total taxable wages paid by each employer in the

industrial classification division during the twelve consecutive months ending on June thirtieth by the employer's contribution rate established for the next calendar year and dividing the aggregate product for all employers in the industrial classification division by the total of taxable wages paid by all employers in the industrial classification division during the twelve consecutive months ending on June thirtieth. Each employer will be assigned to a standard industrial classification code division as determined by the division in accordance with the definition contained in the Standard Industrial Classification Manual, and shall pay contributions at the average industry rate established for the preceding calendar year for the industrial classification division to which it is assigned or two and seven-tenths percent of taxable wages paid by it, whichever is greater, unless there have been at least twelve consecutive calendar months immediately preceding the calculation date

throughout which it account could have been charged with benefits. The division shall classify all employers meeting this chargeability requirement for each calendar year in accordance with their actual experience in the payment of contributions on their own behalf and with respect to benefits charged against their accounts, with a view to fixing such contribution rates as will reflect such experience. The division shall determine the contribution rate of each such employer in accordance with sections 288.113 to 288.127. Notwithstanding the provision of this subsection, any employing unit which becomes an employer pursuant to the provisions of subsection 7 or 8 of section 288.034 shall pay contributions equal to one percent of wages paid until its account has been chargeable with benefits for the period of time sufficient to enable it to qualify for a computed rate on the same basis as other employers.

288.110. Any individual, type of organization or employing unit which has acquired substantially all of the business of an employer, excepting in any such case any assets retained by such employer incident to the liquidation of his obligation, and in respect to which the division finds that immediately after such change such business of the predecessor employer is continued without interruption solely by the successor, shall stand in the position of such predecessor employer in all respects, including the predecessor's separate account, actual contribution and benefit experience, annual payrolls, and liability for current or delinquent contributions, interest and penalties. If two or more individuals, organizations, or employing units acquired at approximately the same time substantially all of the business of an employer (excepting in any such case any assets retained by such employer incident to the liquidation of his obligation) and in respect to which the division finds

that immediately after such change all portions of such business of the predecessor are continued without interruption solely by such successors, each such individual, organization, or employing unit shall stand in the position of such predecessor with respect to the proportionate share of the predecessor's separate account, actual contribution and benefit experience and annual payroll as determined by the portion of the predecessor's taxable payroll applicable to the portion of the business acquired, and each such individual, organization or employing unit shall be liable for current or delinquent contributions, interest and penalties of the predecessor in the same relative proportion. Further any successor under this section which was not an employer at the time the acquisition occurred, shall pay contributions for the balance of the current rate year at the same contribution rate as the contribution rate of the predecessor whether such rate is more or less than two and seven-tenths

per cent, provided there was only one predecessor or there were only predecessors with identical rates. If the predecessor's rates were not identical, the division shall calculate a rate as of the date of acquisition applicable to the successor for the remainder of the rate year, which rate shall be based on the combined experience of all predecessor employers. In the event that any successor was, prior to the acquisition, an employer, and there is a difference in the contribution rate established for such calendar year applicable to any acquired or acquiring employer, the division shall make a recalculation as of the date of acquisition of the contribution rate applicable to any successor employer based upon the combined experience of all predecessor and successor employers, which revised contribution rate shall apply to employment after the date of any such acquisition. For this purpose a calculation date different from July first may be established. When the division has

determined that a successor or successors stand in the position of a predecessor employer, the predecessor's liability shall be terminated as of the date of the acquisition.

288.122. On October first of each calendar year, if the average balance, less any federal advances, of the unemployment compensation trust fund of the four proceeding quarters (September thirtieth, June thirtieth, March thirty-first and December thirty-first of the proceeding calendar year) is more than three hundred fifty million dollars, then each employer's contribution due for the four calendar quarters of the succeeding calendar year shall be decreased by the percentage determined from the following table:

Balance in Trust Fund		
More Than	But Less Than	Percentage of Decrease
$350,000,000	$400,000,000	7%

$400,000,000	12%

Notwithstanding the table in this section, if the balance in the unemployment insurance compensation trust fund as calculated in this section is more than four hundred million dollars, the percentage of decrease of the employer's contributions due for the four calendar quarters of the succeeding calendar year shall be no greater than ten percent for any employer whose calculated contribution rate under section 288.120 is six percent or greater.

288.190.3 Unless an appeal on a disputed determination or referred claim is withdrawn, an appeals tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm, modify, or reverse the determination of the deputy, or shall remand the matter to the deputy with directions. In addition, in any case wherein the appellant, after having been

duly notified of the date, time, and place of the hearing, shall fail to appear at such hearing, the appeals tribunal may enter an order dismissing the appeal. The director may transfer to another appeals tribunal the proceeding on an appeal determination before an appeals tribunal. The parties shall be duly notified of an appeals tribunal's decision or order, together with its reason therefor, which shall be deemed to be the final decision or order of the division unless, within fifteen days after the date of notification or mailing of such decision, further appeal is initiated pursuant to section 288.200; except that, within fifteen days of either notification or mailing of the appeals tribunal's decision or order, the appeals tribunal, on its own motion, may reconsider any decision or order when it appears that such reconsideration is essential to the accomplishment of the object and purpose of this law.

288.200.1 Any of the parties (including the division) to any decision of appeals tribunal, may file with the commission within fifteen days following the date of notification or mailing of such decision, an application to have such decision reviewed by the commission. Such application shall contain specifically and in detail the grounds upon which it is claimed the decision is erroneous. The commission may allow or deny an application for review. If an application is allowed, the commission may affirm, modify, reverse, or set aside the diction of the appeals tribunal on the basis of the evidence previously submitted in such case or may take additional evidence or may remand the matter to the appeals tribunal with directions. And additional hearing shall be conducted in accordance with the requirements of subsection 2 of section 288.190. The commission shall promptly notify the parties of its decision and its reasons therefor. If an application for review is denied, the

decision of the appeals tribunal shall be deemed to be the decision of the commission for the purpose of judicial review and shall be subject to judicial review within the time and in the manner provided for with respect to decisions of the commission except that the time limitations shall run from the date of notice of the order of the commission denying the application for review.

CONCLUSIONS OF LAW:

The evidence shows that the Decision of Appeals Tribunal in Appeal No. E-454-88, which was issued on July 21, 1989, reversed the administrative "successorship" determination of the Division and held that PoPeople, Inc., shall not stand in the position of American Folks, Inc., in all respects as provided under Section 288.110, RSMo. 1986. The evidence also shows that said Decision of Appeals Tribunal was not appealed from further by the appellant and subsequently became final in accordance

with the Law (See RSMo. Section 288.190.3).

Because the statutory time period for filing an Application for Review from the Decision of Appeals Tribunal expired without any appeal's being filed by the Division, by the appellant or by American Folks, Inc., the Appeals Tribunal is now statutorily constrained to follow its holding in that prior decision. It is important to point out that the party who initially appealed from the Division's administrative "successorship" determination was the appellant, PoPeople, Inc. The appellant filed that initial appeal because it wished to escape from the responsibly for shouldering the burden of the liability for delinquent contributions, interest and penalties that had accrued during the time that its two restaurants had been operated by their previous owner, American Folks, Inc.

The Decision of Appeals Tribunal in Appeal No. E-454-88 indicates that the reason for

the reversal of the Division's initial "succeşsorship" determination was the Appeals Tribunal's agreement with the appellant that the wording of the Bankruptcy Court Motion and Order which allowed for the appellant to purchase two Missouri restaurants from American Folks, Inc., in the first place, required that all taxes be prorated between American Folks, Inc., and PoPeople, Inc., as of the closing date of the sale of those assets: December 21, 1987.

However, in the instant appeal, the appellant now is heard to say that, despite achieving its previous victory on the point that it should not have to shoulder the burden of unpaid contributions, interest and penalties accrued by American Folks, Inc., it nevertheless wishes to clothe itself with the benefits that it would have inherited had the prior "successorship" determination been left undisturbed; namely, the favorable contribution and

benefit experience and annual payrolls of American Folks, Inc., which in turn are the aspects of "successorship" that can deliver to a "successor" employer the lower and more favorable contribution rate which would have been enjoyed by the "predecessor" employer. Essentially, the appellant urges the Appeals Tribunal to find that the various aspects of employer liability which are transferred from a predecessor employer to a successor employer by operation of RSMo. Section 288.110, may be segregated from one another and separated out. This view, if upheld, would allow a subsequent operator of business to inherit some, but not all, of the various aspects of "successorship".

However, after carrying the appellant's logic to its ultimate conclusion, the Appeals Tribunal is not persuaded that either the language or the spirit of the Law (Section 288.110) allows for the special treatment that the appellant requests from the Division. The Appeals

Tribunal has found no statutory or judicial authority for the proposition that the various aspects of "successorship" (the predecessor's separate account, actual contribution and benefit experience, annual payrolls, and liability for current or delinquent contributions, interest and penalties) may be parceled out or separated from one another. The Appeals Tribunal has not been able to find any precedent for taking such an approach, and the appellant has not cited any such authority.

Upon an examination of the language of Section 288.110, it is obvious that the Legislature has gathered together the various burdens and benefits which accompany the status of being an employer in the state and has statutorily decreed that this collection of burdens and benefits may be transferred from a predecessor employer to a successor employer under certain circumstances. In other words, if a successor employer

acquires substantially all of the business of a predecessor employer and also continues that acquired business without interruption, it shall inherit the entire package of burdens and benefits which previously resided with the predecessor.

After a careful reading of the Missouri Court of Appeals case which the appellant cited in its Brief, Acton Corporation v. Labor and Industrial Relations Commission, 602 S.W. 2d 53 (Mo. App. 1980), as well as the other cases cited in that opinion which have construed the provisions of Section 288.110, the Appeals Tribunal is persuaded that the construction of this statutory section which is urged by the appellant, has no basis in legislative authority or judicial precedent. The Appeals Tribunal is unable to find any authority for the proposition that an employer may acquire some portion of a business from a predecessor employer, appeal from an administrative successorship determination made by the

Division and assert that it should not be responsible for unpaid contributions accrued by the predecessor and then, after achieving an administrative reversal of that "successorship" determination, be heard to say that it should nevertheless inherit all of the favorable aspects of successorship while forsaking the unfavorable aspects. This is simply nothing more than blowing hot and cold at the same time.

In order to provide for the employment security of employees who work first for a predecessor employer and then later for a successor employer, it is obvious that the Legislature intended to allow for a shifting of all of the burdens and benefits of employer liability from the first employing entity to the second, under certain conditions. Although the appellant asserts that allowing it to escape liability for delinquent contributions and yet retain all of the other, more favorable aspects of

successorship would enhance the employment security of its employees, the Appeals Tribunal finds that the opposite would be the case. To allow the appellant to pick and choose among the various aspects of successorship, seizing the aspects which it finds favorable and forsaking the aspects which it finds unfavorable, would actually frustrate the intent and purpose of the Law.

Allowing the appellant to reap the benefits of successorship from American Folks, Inc., without shouldering the burdens, would simply result in a situation where the appellant would receive the favorable contribution rate treatment of the predecessor without paying for it; that is, without agreeing to be responsible for the accrued liability for unpaid contributions. The unpaid contributions, interest and penalties accrued by American Folks, Inc., remain unpaid. The Appeals Tribunal is unable to see how allowing the appellant

to escape from that liability and yet receive the first employer's favorable contribution rate would do anything to enhance the employment security of the workers.

Because the Appeals Tribunal is not persuaded that the Law will allow for the "severability" of the various aspects of successorship listed in Section 288.110, it is held that the appellant's prayer for the lower, more favorable contributions rates which have been assigned to American Folks, Inc., for calendar years 1988 and 1989, must be rejected. There is no authority for such severability and, because the Appeals Tribunal has already issued a decision which reversed the Division's initial "successorship" determination, a decision which has become final, it must be found that PoPeople, Inc., is not a "successor" to American Folks, Inc., under the law, and further that PoPeople, Inc., shall not stand in the position of American Folks, Inc., in

any respects as provided under Section 288.110, RSMo. 1986.

As a further argument, the appellant again urges the Appeals Tribunal to note the language of the Motion and Order of the United States Bankruptcy Court which allowed it to purchase the two restaurants in question from American Folks, Inc. The Appeals Tribunal has noted the language of those documents, and it has fond therein nothing to indicate that the Bankruptcy Court was purporting to make any order relating to the prospective taxation of the appellant, other than the simple statement that "[a]ll taxes" would be prorated, as of the date of the sale of the restaurants by the bankruptcy Debtor to the appellant. The language of the Motion approved by the Bankruptcy Court simply does not address the tax rate which state governmental taxing entities might levy against the appellant in accordance with a normal and regular application of their taxation laws.

In this case, the Division simply treated the appellant as new employer effective January 1, 1988, because of a final Appeals Tribunal's decision which it had received and which held that the appellant was not a "successor" employer to American Folks, Inc. In this way, the Division mechanically applied the neutral statutory provisions of the Missouri Employment Security Law to the situation which existed.

In accordance with RSMo. Section 288.090.2, any employer in this type of business which has begun employing workers in the state, without having been administratively determined to have succeeded to the business of a predecessor employer, is statutorily assigned a standardized beginning contribution rate of 2.700 percent. This is what the Division determined for the appellant for calendar year 1988. Similarly, because of the provisions of RSMo. Section 288.122, the Division was required to reduce the

contribution rate for all employers by seven percent of the normally applicable rate for calendar year 1989. Once again, the Division simply made a mechanical and neutral application of the statutory provision in the case of the appellant and calculated a resultant contribution rate for the appellant of 2.511 percent for calendar year 1989.

In its Brief, the appellant asserts that the establishment of the above contribution rates for calendar years 1988 and 1989 amounts to discriminatory treatment and the working of a penalty upon it by the Division. The appellant cites, and the Appeals Tribunal has noted, the anti-discrimination provision contained in the United States Bankruptcy Code, at 11 U.S.C. Section 525.

However, the Appeals Tribunal cannot agree with the appellant's characterization of the Division's determination of it contribution rates as "discrimination" as contemplated in that provision of federal

law. As indicated above, the Appeals Tribunal find that the Division has simply made a neutral application of various provisions of Missouri law which set forth the manner of assigning and calculating contribution rates or tax rates for employment security taxes in this state. All new employers receive this same treatment, and the Appeals Tribunal is unable to agree with the notion that the Division has discriminated against the appellant because the appellant was associated with a debtor under the Bankruptcy Act.

Furthermore, it would be difficult to conclude that the Division has manifested an intent to "discriminate" against the appellant in this case, when the evidence clearly shows that the Division's original intent was to find that the appellant was a "successor" to American Folks, Inc., and that the appellant, not the Division, initiated the appeal from such administrative determination, which later

resulted in the Appeals Tribunal's decision reversing the earlier successorship finding.

During the hearing of this appeal, the appellant also injected into the proceedings a discussion of the Division's administrative determination regarding its contribution rate for calendar year 1990. However, the Notice of Hearing for this appeal does not appear to confer upon the Appeals Tribunal jurisdiction to render a decision regarding the contribution rate for calendar year 1990. Consequently, the Appeals Tribunal declines to render a decision regarding the exact contribution rate which should be established for the appellant for calendar year 1990. Nevertheless, if this Decision subsequently becomes final, all of the foregoing considerations expressed herein would obviously be controlling as to the starting point for the calculation of the appellant's 1990 contribution rate.

DECISION:

The administrative determination is affirmed. PoPeople, Inc., became an "employer" subject to the Missouri Employment Security Law, effective January 1, 1988. The contribution rate of PoPeople, Inc., shall be 2.700 percent for calendar year 1988 and 2.511 percent for calendar year 1989. The new employer account number and standard industrial classification code assigned to PoPeople, Inc., by the Division in its September 14, 1989 "employer" liability determination shall remain unaltered.

Dated and mailed at Jefferson City, Missouri, this 3rd day of January, 1990.

STANLEY R. O'DELL
APPEALS REFEREE

APPENDIX C

LABOR AND INDUSTRIAL RELATIONS COMMISSION
Jefferson City, Missouri

ORDER OF THE COMMISSION

Commission No. CR-1959
Appeal No. E-329-89
Account No. 576776

In the Matter of the contribution rate under the Missouri Employment Security Law of PoPeople, Inc., for the calendar years 1988 and 1989 and all other issues incident thereto.

The Application for Review has been given due consideration by the Commission. The Commission finds the decision of the Appeals Tribunal should be affirmed because it is fully supported by the competent and substantial evidence on the whole record and it is in accordance with the relevant provisions of the Missouri Employment Security. The Commission adopts the decision of the Appeals Tribunal as the decision of the Commission in this matter.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Hannelore D. Fischer, Chairman

Robert L. Fowler, Member

Lester L. Watkins, Member

Attest:

Mary L. Lanza, Secretary

This is to certify that on February 21, 1990 copies of the within Decision of the Commission were mailed to the interested parties as shown on the OFFICIAL ADDRESS RECORD.

Mary L. Lanza/bm
Secretary

The Commission Decision becomes final ten days after the date of mailing of such decision under Section 288.200.2, RSMo. 1986. Within ten days after a decision of the Commission has become final, a party aggrieved thereby may secure judicial review as provided for in Section 288.210 RSMo 1986. THIS MEANS THAT AN AGGRIEVED PARTY HAS TWENTY DAYS FROM THE DATE OF ORDER TO APPEAL TO THE APPROPRIATE COURT FOR JUDICIAL REVIEW.

APPENDIX D

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

PoPEOPLE, INC., Petitioner,	)	
vs.	)	Case No. CV190-257CC
LABOR AND INDUSTRIAL RELATIONS COMMISSION AND DIVISION OF EMPLOYMENT SECURITY, Respondents.	)	

JUDGMENT

Now, the Court, being fully advised, finds that, based upon the whole record, the decision of the Labor and Industrial Relations Commission is supported by competent and substantial evidence and is correct as to the law.

THEREFORE, it is ordered that said decision be affirmed.

7-2-91
Date

James F. McHenry
JUDGE, DIVISION I

APPENDIX E

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

June 2, 1992

Mr. James O. Swaney, Jr.
Suite 210
304 West Walnut
Independence, Missouri 64050

In re:

PoPeople, Inc. vs. Labor and Industrial Relations Commission, and Division of Employment Security, Supreme Court No. 74070

Dear Mr. Swaney:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled. Opinion modified on Court's own motion."
Price, J., not participating.

Very Truly Yours,

THOMAS F. SIMON

Mary Elizabeth McHaney
Deputy Clerk, Court en Banc